Nos. 77-1080 and 77-6073

In the Supreme Court of the United States

OCTOBER TERM, 1977

VIRGIL REDMOND, PETITIONER

v.

UNITED STATES OF AMERICA

FRANCIS LUND, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITIONS FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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OPINION BELOW

The opinion of the court of appeals (Pet. Exh. A)[1] is reported at 546 F. 2d 1386.

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[1]"Pet. Exh." refers to the Exhibits in No. 77-6073.

JURISDICTION

The judgment of the court of appeals was entered on January 4, 1977. Petitions for rehearing were denied on December 21, 1977 (Pet. Exh. B). The petition for a writ of certiorari in No. 77-6073 was filed on January 20, 1978. On January 18, 1978, Mr. Justice White extended the time for petitioner Redmond to file a petition to and including January 31, 1978, and the petition in No. 77-1080 was filed on January 30, 1978. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether the district judge's comments and questions deprived petitioners of a fair trial (both petitions).

2. Whether the prosecutor suppressed material evidence favorable to the defense (Pet. No. 77-6073 only).

3. Whether the district court's failure to rule on requested jury instructions prior to closing arguments was plain and prejudicial error in this case (Pet. No. 77-6073 only).

4. Whether conviction for multiple counts of using the mails in execution of a scheme to defraud violates the Double Jeopardy Clause (Pet. No. 77-6073 only).

STATEMENT

Following a jury trial in the United States District Court for the District of Utah, petitioners were convicted on eight counts of using the mails in the fraudulent sale of securities, in violation of the Securities Act of 1933, 48 Stat. 84, as amended, 15 U.S.C. 77q(a) and 77x. Petitioners were sentenced to consecutive terms adding to 18 years' imprisonment, and each petitioner fined $40,000.

The evidence at trial established that petitioners, Carl Powers, and Rio de Oro Mining Company executed a

scheme to defraud stock purchasers of the value of more than 5.7 million shares of stock (II Tr. 97, 233, 249; III Tr. 270, 325, 326, 408, 423, 432, 449, 452, 455, 466, 527). Petitioner Redmond obtained control of Rio de Oro, a shell corporation, and merged it with two other shell corporations controlled by petitioners and Powers. Petitioner Lund, acting as attorney for Rio de Oro, prepared an opinion letter falsely stating that the stock acquired in one of the mergers was free-trading. Petitioners and Powers caused the stock acquired in these mergers to be distributed to themselves and their nominees and then sold the stock publicly through the mails or used it to pay for goods and services received by them (II Tr. 71, 76-78, 85, 239; III Tr. 366-368, 460; IV Tr. 541, 548, 558-561, 585, 593, 601, 644).

ARGUMENT

1. Both petitioners argue that their trials were beset with unwise and injudicious comments by the trial judge. We agree with petitioners. Many comments (see Pet. Exh. C) were improper; some were merely overzealous. We have previously expressed the view that the judge who tried this case no longer should be allowed to preside over criminal cases (see *United States* v. *Ritter*, C.A. 10, No. 77-1829, reprinted as an appendix to Pet. No. 77-1080. Although Judge Ritter's death has mooted our request for reassignment of his cases, we have taken special care to examine each of his remarks here to determine whether they were so prejudicial that petitioners were denied a fair trial.

We submit that the court of appeals properly held that petitioners were not deprived of a fair trial, and that although the case "comes close to the line, [it] is still within permissible bounds" (Pet. Exh. A, p. 12). See *Glasser* v. *United States*, 315 U.S. 60, 80-83. The evidence

of petitioners' guilt was overwhelming; they do not now contend otherwise. And the court mitigated the effects of its statements—not all of which were said in the jury's presence—by instructing the jury to decide the case only on the evidence and to disregard any comments by the judge that might reflect any view of the evidence (V Tr. 886-887):

> Now, if, in the course of the trial, this Judge has made any statement or remark or in any way indicated his view about the weight of the evidence, the credibility of the witnesses or the facts with which you disagree and entertain a different view, then you should follow your own view of the weight of the evidence, the credibility of the witnesses and the facts and wholly disregard anything that I said about those matters. Now, you are to follow your own view and disregard anything else that was said. Because you are the sole judges of the evidence and the facts.
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> * * * * *
>
> But, of course, during the trial as we were moving—and we did move this case rather rapidly—in ruling on the evidence as it comes in, I may have said some things that might be interpreted by you—I don't know that I did. In fact, I don't think I did. But if I did at any time make any statement or any remark, anything that you interpret as my view about the evidence, my view about the weight of the evidence or my view about the facts, you are wholly to disregard it. Follow your own views with respect to that evidence and its weight and the credibility that you think it ought to be given to the witnesses who testified.

There would be little point in discussing the effect of each of Judge Ritter's comments. The court of appeals has been sensitive to claims of misconduct by Judge Ritter; indeed, one of our objections to his continued holding of criminal trials was that his misconduct was so pervasive that it was practically impossible to obtain a conviction that would withstand appellate scrutiny (see, *e.g.*, *United States* v. *Peterson*, 456 F. 2d 1135 (C.A. 10)). The court of appeals' decision that the trial judge's conduct here was not sufficiently improper that a new trial must be held depends entirely on the particular facts of this case and does not require review by this Court.[2]

2. Petitioner Lund contends that the prosecutor and the district court suppressed material evidence favorable to the defense in failing to allow petitioner additional time to locate a witness (IV Tr. 741-742). The witness had been subpoenaed by the government but had been excused without testifying.[3]

But this witness was not unknown to Lund; his existence and testimony were not "suppressed." Because

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[2]Moreover, petitioner Redmond's contention that the district court's conduct deprived him of the effective assistance of counsel was not raised on appeal and therefore has not adequately been preserved for review here.

Petitioner Redmond's argument (Pet. 13) that the decision here conflicts with decisions of other courts is incorrect. The cases to which petitioner refers held only that particular conduct was sufficiently prejudicial to require a new trial; they applied in making that inquiry the same legal standard used by the court of appeals here.

[3]Although the district court initially refused to allow witnesses to be excused after testifying (II Tr. 123, 150-151), it later permitted some of them to leave unless instructed otherwise (III Tr. 267, 286, 365-366, 369, 425, 432, 441, 444, 454, 457, 481, 524, 532, 545, 555-556, 567, 584, 588, 592, 595, 598, 600, 613, 632).

petitioner Lund did not subpoena the witness or request that the government keep him on hand, he may not now complain.[4] As the court of appeals held (Pet. Exh. A, p. 7), the district court acted within its discretion in not delaying the trial to permit petitioner Lund to obtain the presence of the witness.

3. Petitioner Lund argues that the district court erred in not ruling before closing arguments on defense counsel's requested jury instructions and in refusing to give a particular good faith instruction requested by counsel. These claims do not warrant review.

The failure to rule on jury instructions prior to closing arguments was a clear violation of Fed. R. Crim. P. 30. But this error requires reversal only if it causes specific prejudice to a defendant. *Hamling* v. *United States*, 418 U.S. 87, 131-135. Petitioner Lund contends (No. 77-6073 Pet. 10) that the district court's failure to rule on the instructions precluded trial counsel from making an effective closing argument, because he "did not know whether he would be able to argue 'mistake of law' based on the court's instructions." But where, as here, the instruction given is correct, this general contention that better knowledge might have led to better argument is not enough to show prejudice. An earlier ruling simply would have dashed any hope petitioner may have had to argue "mistake of law."

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[4]During the third day of trial the prosecutor stated that he had fewer than ten remaining witnesses and might not call some of them (III Tr. 532-533). Petitioner was thus put on notice that the witness in question might be released. Petitioner was aware, moreover, that the district court would brook no delay in the production of witnesses by counsel. At the outset of the case, the district court stated (II Tr. 69):

> Now, I want the United States to have your witnesses organized and in the order in which they are to come in so there will be no delay whatsoever. If there is any delay we won't hear the witnesses. You folks will have to have the witnesses standing by and ready so that when one goes out another one comes in. I want that done efficiently and quickly.

The record shows that petitioner Lund knowingly made misrepresentations and took an active role in the fraudulent scheme (II Tr. 162, 168-169; IV Tr. 695, 736-738). The district court charged the jury on willfulness, specific intent, reasonable doubt, and the presumption of innocence (V Tr. 866-869, 897, 900); it was not required to give a "mistake of law" charge where the evidence did not show that petitioner had relied on an authoritative legal ruling that he was entitled to act as he did.

4. Petitioner Lund finally argues that his conviction of eight counts of using the mails in furtherance of a scheme to a defraud violates the "rule of lenity" and the constitutional prohibition against double punishment for a single "offense." But each separate use of the mails in the execution of a scheme to defraud is a separate offense. *United States* v. *Dioguardi*, 492 F. 2d 70, 83 (C.A. 2), certiorari denied, 419 U.S. 873; *United States* v. *MacRay*, 491 F. 2d 616, 619, 623-624 (C.A. 10), certiorari denied, 416 U.S. 972; *Sanders* v. *United States*, 415 F. 2d 621, 626 (C.A. 5), certiorari denied, 397 U.S. 976. See *Badders* v. *United States*, 240 U.S. 391, 394. Each of the counts of which petitioner was convicted referred to a separate offer and sale of specified securities to a certain named buyer, and each count alleged one specific use of the mails, thus setting out a separate and complete fraudulent transaction. Petitioner simply committed a plentitude of crimes to swindle many buyers. It was all part of a general scheme, but one scheme can comprise many discrete crimes.[5]

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[5]Because the evidence at trial established many different fraudulent transactions, this case provides no occasion to apply the principle of lenity, which means only that courts will not strain a statute to broaden its scope (or the number of crimes it creates). Compare *Bell* v. *United States*, 349 U.S. 81, 83-84, with *Scarborough* v. *United States*, 431 U.S. 563.

CONCLUSION

The petitions for a writ of certiorari should be denied.

Respectfully submitted.

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MARCH 1978.

DOJ-1978-03